16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

—v.—

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE ACLU AS *AMICUS CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to defending the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the fundamental rights of freedom of speech and association, including the seminal cases of *Whitney v. California*, 274 U.S. 357 (1927); *Hague v. CIO*, 307 U.S. 496 (1939); *West Virginia v. Barnette*, 319 U.S. 624 (1943); *New York Times v. Sullivan*, 376 U.S. 254 (1964); and *United States v. New York Times*, 403 U.S. 713 (1971).

Because this case requires the Court to weigh competing speech and associational interests, its proper resolution is a matter of significant concern to the ACLU and its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner objects to paying a fee to cover certain services that state law requires his exclusive bargaining agent to provide him, such as handling workplace grievances. But as long as Petitioner is required only to pay for workplace services, and not the union's ideological speech—as has been the case

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties providing blanket consent to the filing of *amicus* briefs are on file with the Clerk, pursuant to Rule 37.6.

for forty years under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—the First Amendment is vindicated.

Just as a public employee has no First Amendment right to object to the regulation of her speech on the terms and conditions of her employment, so Petitioner, a public employee, has no First Amendment right to object to being compelled to subsidize employee union speech on the terms and conditions of his employment. By contrast, just as the First Amendment is implicated when a public employer punishes an employee based on her speech concerning a matter of public concern, so Petitioner has a First Amendment right not to subsidize the union's ideological speech, that is, speech on matters of public concern. In both contexts, the lines the Court has drawn respect the fundamental difference between the government's authority to govern its employees on workplace matters, and the government's authority to regulate the citizenry as sovereign. Petitioner's proposed extension of First Amendment rights to speech concerning the terms and conditions of public employment ignores that fundamental distinction.

Moreover, the regulation of public sector unions involves not just the associational and speech interests of dissenters, but also those of union members, as well as the state's vital interest in furthering labor peace through its choice of governance rules in its own workplace. Most states have chosen to manage their workplaces by recognizing an exclusive bargaining representative, and imposing on those unions the obligation to represent all workers, regardless of whether they belong to the union. This Court has long recognized the permissibility of that state choice to further labor peace. If Petitioner is correct that nonmembers have

a right to refuse to pay even for workplace-related services the union is legally required to provide them, the result would be to burden the associational interests of those who choose to join the union by forcing members to pay for nonmember services. The *Abood* rule, by contrast, simultaneously ensures that nonmembers are not compelled to subsidize ideological speech with which they disagree, and avoids imposing the costs of nonmember services on those who choose to associate.

Some members of this Court have worried about whether the line drawn in *Abood* is administrable. But states, unions, and courts have been administering it for decades. And the procedures announced in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986), and its progeny minimize the burden on dissenters related to agency fees and provide breathing room for their First Amendment rights.

Petitioner asks this Court to reject *Abood* and hold any compelled agency fees categorically unconstitutional. To do so, however, would undermine the free speech interests of members, upend long-settled free speech doctrine, and interfere with state decisions to foster labor peace. In place of *Abood*'s principled distinction between fees used to administer a collective bargaining agreement—including such prosaic matters as contract administration and grievance adjustment—and those used for ideological activities, Petitioner would have this Court engage in ad hoc decisions about whether the activities of an organization writ large, from a bar association to a union, are "political" in some categorical sense or, in the formulation of the United States, do work that implicates "issues of public policy." That approach conflicts directly with the line this Court has drawn, not only in *Abood*, but in numerous public employee

speech cases, and in cases involving compulsory fees for other sorts of associations. Petitioner offers no principle for distinguishing between fees for unions, on the one hand, and those for bar associations and student activities, on the other.

This Court should reject Petitioner's invitation to eclipse those other vital interests in favor of his alone. It should uphold the speech and associational interests not only of dissenters but also of union members, as well as the states' vital interests in workplace governance and labor peace—and reaffirm *Abood*'s basic compromise.

ARGUMENT

I. THIS CASE INVOLVES COMPETING SPEECH AND ASSOCIATIONAL INTERESTS, AS WELL AS VITAL STATE INTERESTS IN LABOR PEACE AND WORKPLACE GOVERNANCE.

This case requires the Court to weigh not only the associational interests of individuals who oppose paying agency fees, but also the interests of those who wish to associate in a union, and the state's important interests in labor peace and workplace governance.

Abood established that dissident employees have a First Amendment right to refuse to pay for a union's *ideological* activities and to decline to join the union. 431 U.S. at 234–35. Requiring a public employee, as a condition of employment, to do more than contribute his or her share of the costs of representation to the union—by becoming a union member or paying for speech not related to the representational services he receives—violates the freedom of association. *See*

Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate").

But the interests of dissident employees are not the only interests at stake in public workplaces. Individuals who wish to associate in a public employee union, too, have associational interests. If dissenters were afforded a right not to pay fees to cover the services the union must give them by law, that would penalize those who choose to join a union. Petitioner never explains why his interest in not associating justifies imposing this cost on members' interests in associating, particularly since he is required to support only speech on the terms and conditions of his employment—precisely the sort of speech that is not entitled to First Amendment protection vis-à-vis the government as manager in the public workplace. *See* Section II, *infra* (discussing parallel between *Pickering* and *Abood*).

As this Court has recognized, fair share provisions for nonunion workers are necessary to avoid a "free rider" problem where workers refuse to fund the union while benefiting from its activities. *See Abood*, 431 U.S. at 221–22 ("A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."); *see also Harris v. Quinn*, 134 S. Ct. 2618, 2636 (2014) (agency fees are justified by "the fact that the State compels the union to promote and protect the interest of nonmembers"); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 181 (2007) (same). Without such fair share provisions, associations of public sector employees

would be penalized by being compelled to bear the costs of representing dissenters. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556–57 (1991) (Scalia, J., concurring in judgment in part and dissenting in part).[2]

Accepting Petitioner's invitation to privilege his interests over those of members would come at a steep cost both to those individuals who choose to associate in a union, and to the value of such associations to the state and worker alike. This Court has long recognized the fundamental importance of the freedoms of association and assembly. *See, e.g., Jaycees*, 468 U.S. at 622; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–08 (1982); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Hague v. CIO*, 307 U.S. 496, 512–13 (1939); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Whitney v. California*, 274 U.S. 357, 372–73 (1927) (Brandeis, J., concurring). It has also acknowledged the value, deeply embedded in our Nation's history, "of persons sharing common views banding together to achieve a common end." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981). *See also* Alexis de Tocqueville, DEMOCRACY IN AMERICA 492 (Harvey C. Mansfield & Delba Winthrop, eds. 2000) ("In democratic countries the science of association is the mother science; the progress of all the others depends on the progress of that one.").

In addition to the competing associational interests at stake, this case directly implicates the state's

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[2] The resulting decline of public sector unions would not only undermine the state's interest in managing its workforce relations and labor peace, but would also diminish the public sphere by weakening key civic institutions advocating for workers' interests.

weighty interest in choosing how best to promote efficient, productive, and peaceful public workplaces. Public sector bargaining regimes are a creation of state and federal law, produced when a government, in its discretion, chooses to manage its employees by way of collective bargaining. There is no right to bargain with a government: "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Smith v. Arkansas State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (internal citations omitted). *Cf.* N.C. Gen. Stat. § 95–98 (forbidding public sector bargaining). Thus, it is the prerogative of a state to choose, as a matter of policy, how to best manage its employees—and whether to choose exclusive bargaining as the most effective manner to do so.

This Court has, for well over a century, recognized the government's legitimate need to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." *Ex parte Curtis*, 106 U.S. 371, 373 (1882). "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs." *Connick v. Myers*, 461 U.S. 138, 151 (1983) (internal quotation omitted); *see also, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (noting "the emphasis of our precedents on affording government employers sufficient discretion to manage their operations").

Congress, 41 states, the District of Columbia, and Puerto Rico have made the choice to authorize exclusive representation for at least some public

employees. That decision is unsurprising. Collective bargaining "is often an essential condition of industrial peace." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); *id.* ("Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."). Accordingly, the vast majority of states have chosen to negotiate with an exclusive bargaining representative, rather than deal separately with rival unions in a single workplace, or with thousands, if not tens or hundreds of thousands, of individual employees.

Public sector unions also promote workplace democracy. Unions give workers a voice in determining the terms and conditions under which they work. Exclusive bargaining was modeled on political democracy; in both contexts, a representative bears both the authority and the responsibility to act in a representative capacity relative to the individuals it represents.

Each of these vital interests—of dissenters, of individuals who choose to join a union, of the state's prerogative as employer, and of labor peace and workplace governance—warrant consideration in the rule that governs public sector union fees.

II. *ABOOD* STRIKES A PROPER BALANCE BETWEEN THE MULTIPLE INTERESTS AT STAKE BY RECOGNIZING THE FUNDAMENTAL DISTINCTION BETWEEN GOVERNMENT AS EMPLOYER AND GOVERNMENT AS SOVEREIGN.

The rule established in *Abood* fairly balances the competing interests at stake in regulating public sector unions. It does so by relying on the well-established principle that the government as employer has substantially greater latitude to regulate its employees' speech than the government exercises in regulating the citizens at large. *Abood* protects dissidents' rights not to support speech on matters of public concern, but permits the state to compel them to support speech related to the terms and conditions of their employment. It sensibly distinguishes between fees used towards administering a collective bargaining agreement (when a union engages with the government *as employer*) and those used towards ideological activities (when a union engages with the government not as *employer* but as *sovereign*).

When the government imposes rules governing public sector unions, it is regulating its own workplace, not the citizenry at large. And this Court has long recognized that governments have broader latitude in that context:

> Time and again our cases have recognized that the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large. This distinction is grounded on the common-sense realization that if every employment decision became a

> constitutional matter, the Government could not function.

NASA v. Nelson, 562 U.S. 134, 148–49 (2011) (citations and internal quotation marks omitted); *see also, e.g.*, *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 609 (2008) ("[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate . . . and the government acting . . . to manage [its] internal operation." (internal quotation marks omitted)); *Harris*, 134 S. Ct. at 2653 (Kagan, J., dissenting) ("This Court has long acknowledged that the government has wider constitutional latitude when it is acting as employer than as sovereign."). *Cf. Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993) (distinguishing between government as regulator and government as proprietor).

For decades, under *Abood*, this Court has distinguished between fees that contribute to the internal operations of workplace governance and those that are expended to affect a broader political process. *Abood* held that the First Amendment permits the state to require public employees to pay a fee to a union selected as their exclusive representative to cover the costs of collective bargaining, contract administration, and grievance adjustment—but not to subsidize "the expression of political views" or activities "on behalf of political candidates, or toward the advancement of other ideological causes" unrelated to its bargaining duties. 431 U.S. at 235.

Abood's approach vindicates the First Amendment interest of dissenting employees by allowing them both to decline to join the union, and to refuse to pay for the union's ideological activities. Its holding

reflects this Court's long recognition that governments may not force a public employee to relinquish her right of political association as the price of holding a public job or enjoying its benefits. *See, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990); *Elrod v. Burns*, 427 U.S. 347, 360–61 (1976); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967). But at the same time, *Abood* acknowledged the state's prerogative to require all employees to pay their fair share for services provided by the union related to the terms and conditions of their employment. 431 U.S. at 235.

The line drawn in *Abood* between permissible union dues for workplace governance and impermissible mandates to fund ideological speech tracks its closest doctrinal parallel: the *Pickering* line of case law governing public employees' First Amendment rights. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). The speech of public employees enjoys "considerable First Amendment protection." *O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998). However, the Court has drawn a clear line between protecting the speech of public employees *as citizens*, on the one hand, and permitting government employers to regulate workplace speech of its *employees* on the other.

A public employee's speech receives First Amendment protection *only* if she is speaking as a citizen on a matter of public concern. *See Garcetti*, 547 U.S. at 418. Speech on workplace matters, such as the terms and conditions of employment, is not entitled to First Amendment protection vis-à-vis the government's regulation of the workplace. *See Pickering*, 391 U.S. at 568. Even when an employee's speech is protected, because it addresses a "matter of public concern," a

public employer can justify adverse action by demonstrating that the harm to its interest "in promoting the efficiency of the public services it performs" outweighs the employee's First Amendment rights. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (internal quotation marks omitted).

Thus, this Court has repeatedly expressed both an unwillingness to permit public employees to "constitutionalize" every workplace grievance, and the importance of the government's interest in running efficient and effective workplaces. *Connick*, 461 U.S. at 154. *Abood* makes the same distinction, and protects the vital interests on both sides of the employment equation. Just as public employees have a First Amendment right not to be penalized for their private speech on matters of public concern, so Petitioner has a First Amendment right not to subsidize the union's ideological speech. And conversely, just as public employees do not have First Amendment protection for speech addressing the terms and conditions of employment under *Pickering*, so Petitioner has no First Amendment right to object to paying fees to cover the costs of union speech concerning the terms and conditions of his employment. *Abood*, like *Pickering*, is founded upon the government's prerogative to manage its workplace, including by requiring agency fees, insofar as they support workplace governance rather than ideological speech.

Building on *Abood*, this Court's jurisprudence has robustly upheld the rights of dissenting employees to refuse to shoulder costs for political speech with which they disagree, but preserved the state's prerogative to charge agency fees for the union's workplace services as exclusive bargaining agent. It has ensured broad latitude for employees to

disassociate, refused to extend agency fees to workers who are not fully public employees, and adopted stringent procedures and defaults for discerning chargeable and nonchargeable fees. *See, e.g.*, *Harris*, 134 S. Ct. at 2638 (refusing to extend *Abood* to nonpublic employees); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012) (requiring new *Hudson* notice for special assessment and an opt-in default); *Davenport*, 551 U.S. 177 (upholding requirement that union receive affirmative authorization before spending fees on election related purposes); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520–21 (1991) (limiting scope of chargeable activities); *Hudson*, 475 U.S. 292 (articulating procedural safeguards to ensure that fees are not used for nonchargeable purposes). As elaborated in Part III, *infra*, those safeguards serve to minimize any associational burden on dissenting employees.

At the same time, *Abood*'s compromise supports the associational interests of union members to avoid the agency costs imposed by free riders. The free rider problem is not merely that nonmembers will benefit from the union's services without bearing their fair share of the cost, but that this cost-shifting would be *compelled by law*. This makes it materially different from the more general issue of free riders in the private sphere. *See Harris*, 134 S. Ct. at 2636; *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in judgment in part and dissenting in part) ("[P]rivate speech often furthers the interest of nonspeakers, and that does not alone empower the state to compel the speech to be paid for"). Because of the duty of fair representation, those who choose to become members of the union would, in the absence of agency fees, be statutorily obligated to pay not only the costs of their own representation, but the costs of representing

nonmembers as well. Nonmembers "are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in judgment in part and dissenting in part); *Harris*, 134 S. Ct. at 2636 (agency fees are justified by "the fact that the State compels the union to promote and protect the interest of nonmembers."). As Justice Scalia noted, the free ridership that would be created by a holding that agency fees are unconstitutional "would be not incidental but calculated, not imposed by circumstances but mandated by government decree." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in judgment in part and dissenting in part).

That free ridership, more critically, would directly undermine the associational interests of union members. Under Petitioner's rule, even employees who favor the union's positions or any benefits it conveys will have every incentive to shift the costs of their representation to members—as they will be able reap the same benefits without spending a dime. As the Internet has repeatedly shown, individuals who get something for free cannot be counted on to voluntarily pay for it. A decision rejecting agency fees would thus deal a severe blow to the interests of those who choose to associate with unions. *Abood*'s compromise, by contrast, respects both members' and nonmembers' associational interests.

Abood's rule, moreover, takes into account vital state and societal interests in maintaining labor peace and promoting workplace democracy—through electing to deal with an exclusive representative on behalf of its employees. This Court has long recognized the "the government's vital policy interest in labor peace." *Lenhert*, 500 U.S. at 519; *see also*

Hudson, 475 U.S. at 302–03 ("[T]he government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights. . . .") (footnote omitted). And it has, for decades, recognized "the national policy," reflected in the National Labor Relations Act, among others, "of promoting labor peace through strengthened collective bargaining." *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982).

Abood provided sufficient latitude to governments in their employment operations to pursue those goals—including in their choice of whether to engage with an exclusive bargaining agent. As this Court explained:

> The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. The desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller.

431 U.S. at 224 (internal citation omitted). For related reasons, this Court upheld exclusive public sector bargaining against First Amendment challenge, recognizing that "[b]oth federalism and separation-of-powers concerns would be implicated in the massive intrusion into state and federal policymaking that recognition of the claimed right [to individually bargain] would entail" and the principle that "[a]bsent statutory restrictions, the state must

be free to consult or not to consult whomever it pleases." *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984).

Abood ensures that unions, who must represent the interests of all employees if they are to further the interest in labor peace, are not required to represent nonmembers for free, thereby undermining the unions' fiscal health. If it is to survive, a union must be able to charge those whom it is statutorily required to represent. *Cf. Keller v. State Bar of California*, 496 U.S. 1, 12 (1990) ("It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."); *Harris*, 134 S. Ct. at 2644 ("States . . . have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.").

In the context of public sector employment, as in many cases involving multiple interests, "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility." *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). *Abood* struck that balance. It crafted a principled framework for vindicating the associational interests not only of dissenting employees—but also of those who wish to associate in a union, and the important state and societal interests in promoting labor peace.

III. THIS COURT HAS ADOPTED SIGNIFICANT SAFEGUARDS THAT MINIMIZE ANY FIRST AMENDMENT CONCERN OVER AGENCY FEES.

For over two decades, unions and employers have relied upon this Court's guidelines in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1991), in developing workable systems that (1) allow unions to charge the costs of fulfilling their representational obligations to members and nonmembers alike, while (2) protecting the nonmembers' constitutional right not to support "ideological causes not germane to [the union's] duties as collective-bargaining agent." *Id.* at 294 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984)).

The procedural safeguards this Court announced in *Hudson* and subsequent cases minimize any First Amendment concern over requiring individuals who do not want to associate with the union to pay their share of the cost of representation. *See Lehnert*, 500 U.S. 507; *Locke v. Karass*, 555 U.S. 207 (2009). *Hudson* "outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its requirement under *Abood*." *Keller*, 496 U.S. at 17. In *Lehnert*, the Court elaborated a three-part standard for determining which union expenditures are chargeable to nonmembers. *Lehnert*, 500 U.S. at 519. Chargeable activities "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.*

Under these precedents, unions may not merely refund dissenters charged fees for nonchargeable

purposes, *see Hudson*, 475 U.S. 292; *Ellis*, 466 U.S. 435; they must "first establish[] a procedure which will avoid the risk that [dissenters'] funds will be used, even temporarily, to finance ideological activities unrelated to bargaining." *Hudson*, 475 U.S. at 305 (internal quotation omitted). Unions must annually itemize their expenses and distinguish chargeable from nonchargeable expenses, under the oversight of an auditor. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 874 (1998); *Hudson*, 475 U.S. at 307 n.18. In addition, "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee." *Id.* And any objections to the chargeability of union fees must be "addressed in an expeditious, fair, and objective manner" in a "reasonably prompt decision by an impartial decisionmaker." *Id.* at 307. Since *Hudson*, this Court has imposed additional safeguards, including requiring a new *Hudson* notice for special assessments, an opt-in default, and further limiting the scope of chargeable activities. *See, e.g.*, *Knox*, 567 U.S. 298; *Lehnert*, 500 U.S. 507.

The Court has nonetheless expressed concern about "practical administrative problems" in applying *Abood*. *Harris*, 134 S. Ct. at 2633. It has also noted a "conceptual difficulty" in distinguishing between public sector union expenditures that are "made for collective-bargaining purposes and those that are made to achieve political ends." *Id.* at 2632. Professors Charles Fried and Robert Post have suggested one way of addressing those concerns. Brief for *Amici Curiae* Charles Fried and Robert C. Post in Support of Neither Party (advocating the statutory duties test proposed by Justices Scalia, O'Connor, Kennedy, and Souter in *Lenhert*). Whether the precise lines drawn by the majority in *Lehnert* or

Justice Scalia's separate opinion are right or wrong, both address the correct question: whether a fee is charged for the internal administration of an employment contract, thus concerning the government acting in its role as employer, *as distinct* from its broader role as sovereign.

There will undoubtedly be cases in which where to draw the line between government as employer and government as sovereign is open to reasonable dispute. *See Knox*, 567 U.S. 298; *Lehnert*, 500 U.S. at 550 (Scalia, J., concurring in judgment in part and dissenting in part). But whether such a line *exists* should not be in question. And many cases will be easy. Expenses directly related to the administration of a grievance procedure, or to the negotiation of a collective bargaining agreement, are plainly chargeable. By contrast, funds expended to advocate about the war on drugs, welfare reform, or abortion would clearly fall on the opposite side of the line. Difficulties in drawing the line in close cases are by no means unique to the *Abood* test, and do not justify abandoning the careful balance of competing interests struck in that case—one on which unions and states have relied for decades.

IV. PETITIONER'S SUGGESTED RULE IS UNWORKABLE AND UNPRINCIPLED AND WOULD THREATEN FUNDAMENTAL FIRST AMENDMENT INTERESTS.

Petitioner asks this Court to rule agency fees categorically unconstitutional. The premise of that argument is that no distinction can be drawn between government as manager and government as sovereign. But that premise is at odds with the entirety of this Court's public employee speech doctrine, which rests on precisely that distinction.

There, as in *Abood*, the Court has drawn a line between speech related to workplace issues and speech on "matters of public concern."

Petitioner asserts, *ipse dixit*, that all "bargaining with government is political advocacy," Pet. Br. 15, and "occupies the highest rung of the hierarchy of First Amendment values," *id.* at 17 (internal quotation omitted). Similarly, the United States characterizes public sector bargaining as "necessarily involv[ing] issues of public policy." U.S. Br. 15. At core, Petitioner believes that because the employer in the public sector is the government, any employment issue is by definition political, and therefore there is no coherent conceptual basis to the distinction between a union's ideological speech and speech on employee's terms and conditions of employment. Pet. Br. 10–11. But this argument plainly proves too much.

In a broad sense, of course, virtually anything can be characterized as political. But the Court has long recognized that the government's roles as sovereign and employer are distinct, and has therefore sharply distinguished speech regarding workplace grievances from speech on matters of public concern. *See, e.g., Connick*, 461 U.S. 138. The *Pickering* line of cases would make no sense if the Court were to accept Petitioner's argument that any issue concerning the terms and conditions of public employment is "political." *See, e.g., Pickering*, 391 U.S. 563; *id.* at 568 ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

Petitioner's argument also cannot be squared with this Court's upholding of compulsory fees in other contexts, including bar associations and student activity fees. *Keller*, 496 U.S. 1 (upholding compulsory bar association dues); *Board of Regents v. Southworth*, 529 U.S. 217, (2000) (upholding compulsory student activity fees). In those cases, the Court has relied, as in *Abood* itself, on the distinction between the government as manager and the government as sovereign. Petitioner tries to avoid the conflict by suggesting that "[t]he Court's bar association and student activities fee precedents . . . can stand on their own." Pet. Br. 33. Petitioner, however, offers no principled basis to distinguish compulsory fees for public sector unions from compulsory fees for other associations that governments both authorize and require to undertake certain public functions—such as bar associations. [3]

Although Petitioner's briefing is not a model of clarity on this point, it appears that Petitioner would have courts make ad hoc decisions about whether associations authorized and required by law to fill certain public functions—such as bar associations or unions—are "political" in some categorical sense.

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[3] Petitioner wrongly cites *Harris* for the proposition that the Court's bar association and student activity fee cases need not be overturned were this Court to overrule *Abood*. Pet. Br. 33. *Harris* did not overrule *Abood*, and found its prior precedents consistent with *Harris*'s holding. 134 S. Ct. at 2643–44. *Harris* simply refused "to sanction what amounts to a very significant expansion of *Abood*," *id.* at 2627, *i.e.*, to extend *Abood* to home care assistants who were "quite different from full-fledged public employees," *id.* at 2638, and regulated under a statutory scheme not comparable to *Abood*'s, *id.* at 2636–37. Petitioner offers no other basis on which to distinguish this Court's other compelled subsidy cases.

Those that are could not constitutionally be funded by agency fees, whereas those that are not could be funded by agency fees. That approach would draw the courts into passing highly subjective judgments on the public importance of an association's activities writ large, and is plainly unworkable. Everything a bar association or collection of student groups does could be construed as in some sense "political"—often more easily than the average public employee grievance. *See Abood*, 431 U.S. at 231 ("There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plane . . . .").

Such an approach would, moreover, raise troubling First Amendment concerns. It would rest First Amendment protection on whether the judiciary recognizes particular associations, categorically, as sufficiently "political" according to a highly subjective standard that many will understand as little more than reflecting the political judgments and values of the judges involved. And it would penalize associations that are engaged in speech that a court deems "political" by requiring their members to subsidize free riders as a matter of federal constitutional law.

By contrast, this Court's precedents, including *Abood*, distinguish—not politically important from unimportant organizations—but activities that contribute to the administration of workplace governance from those used to influence broader civic and political affairs. That basic distinction is foundational to a system of First Amendment jurisprudence that protects the important associational rights of both union members and

dissenters, and the state's vital interest in workplace governance and labor peace.

To do away with the line drawn in *Abood* would undo the conceptual architecture on which this Court has, for decades, sought to respect the competing speech and associational interests at stake in the context of public sector bargaining, as well as the state's vital interest in fostering labor peace in its own workplaces. "[I]t would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance . . . ." *Connick*, 461 U.S. at 154.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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